THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0116

The State of New Hampshire v. Heidi Lilley

The State of New Hampshire v. Kia Sinclair

The State of New Hampshire v. Ginger Pierro

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
4TH CIRCUIT COURT—DISTRICT DIVISION—LACONIA

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald
Attorney General

Susan P. McGinnis, Bar ID No. 13806
Senior Assistant Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671
susan.mcginnis@doj.nh.gov

(15 Minutes)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Contitutional Provisions

ISSUES PRESENTED

I. Whether the trial court properly held that the portion of the Laconia public indecency ordinance that prohibits "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in "public areas" does not violate the defendants' state or federal constitutional right to equal protection because males and females are not similarly situated under these circumstances and protecting public sensibilities is an important government interest that is substantially accomplished by that prohibition.

II. Whether the trial court properly held that that portion of the ordinance does not violate the defendants' state or federal constitutional right to free speech because it restricts only the manner in which they can convey their message, does not inhibit the effectiveness of their message, and leaves open ample alternatives for them to promote their message.

III. Whether the trial court properly held that that portion of the ordinance falls within the regulatory powers granted to the City of Laconia by RSA 47:17, XIII (2012) because it explicitly authorizes cities to determine "the clothing to be worn by bathers and swimmers."

IV. Whether the trial court properly held that that portion of the ordinance is not preempted by or contrary to RSA 645:1 (2016) because the failure to legislate is not legislative action and does not violate RSA chapter 354-A (2009 & Supp. 2016) because it does not limit females' access to public accommodations.

STATEMENT OF THE CASE

The defendants, Heidi Lilley, Kia Sinclair, and Ginger Pierro, were charged with violating Laconia, N.H., Ordinances ch. 180, art. I, § 180-2, A(3) (1998). ASB 1, 3, 5; ADB 89, 91, 93.[1] They then retained the same defense counsel and filed a joint motion to dismiss. ASB 7, 9, 11; ADB 15-23. In it, they conceded they violated the ordinance by exposing their nipples in public, but argued that the charges had to be dismissed because the ordinance violates their rights to equal protection and free speech, lacks an enabling statute, is preempted by RSA 645:1 (2016), and violates RSA 354-A:16 (2009). ADB 15-23. The State objected. ASB 7-20.

At a hearing in the 4th Circuit Court—District Division—Laconia (*Carroll*, J.), the parties agreed that, if the trial court denied the motion to dismiss, they would rely on the testimony presented at the hearing at the subsequent trial. MH 4-6. The defendants also again conceded that they violated the ordinance. MH 8, 14-15, 20. After hearing the testimony and arguments, the trial court took the matter under advisement, MH 7-87. It then denied the motion. ASB 1, 3, 5; ADB 2-7.

Following a bench trial on February 7, 2017, the trial court found all three defendants guilty as charged. ADB 90, 92, 94. It then sentenced each defendant to a $100 fine, suspended for one year. ADB 90, 92, 94. This appeal followed.

---

[1] "AB" refers to the amicus's brief and the attached appendix.
"ADB" refers to the separately-bound appendix to the defendants' brief.
"ASB" refers to the separately-bound appendix to the State's brief.
"DB" refers to the defendant's amended brief and the attached appendix.
"MH" refers to the transcript of the motion hearing on October 14, 2016.

STATEMENT OF FACTS

In 1998, the Laconia City Council adopted an ordinance making it unlawful to knowingly or intentionally appear "nude" in a public place and in doing so, defined "nudity" as the showing of male or female genitalia or female nipples. MH 26, 36-37, 47, 61; *see also* ASB 21-23.

In 2015, Kia Sinclair helped start a Free the Nipple movement in New Hampshire because she breastfed and "realized that there was a very big stigma on [it] and ... women [were] asked to cover up or leave, go in the bathrooms, and such." MH 7. She had also concluded that Americans "hypersexualize[d]" female nipples and "consider[ed] them pornographic and taboo," which "result[ed] in that stigma and ... the idea ... that [they were] harmful to children," which in turn contributed to lower breastfeeding rates in the United States than in the rest of the world. MH 8. Sinclair then told Heidi Lilley about the movement and Lilley joined it because she was a "feminist" and "believe[d] in the equality of the male and female." MH 20. In 2016, she appeared before a committee of the House of Representatives and testified against a bill that would "make it illegal for a woman to ... have bare breasts in ... New Hampshire." MH 21.

On May 28, 2016, Lilley went to Endicott Beach, which is in the Weirs Beach area of Laconia. MH 22, 29. At that time, Ginger Pierro was doing yoga poses topless on the beach with her nipples exposed, many adults and children of all ages were watching her, and a male friend was photographing her. MH 14-17, 55. Pierro's purpose in doing so "was to enjoy the beach." MH 15. She knew that "society" viewed the female "nipple in a sexualized manner," but in her opinion, other people's opinions should not matter unless the conduct was "going to hurt somebody." MH 17-18. She also believed that her conduct was not doing so, MH 11, and that it was instead "providing [a] very healthy example of being human," MH 17.

When Pierro started doing topless yoga, a woman with a three-year-old child moved away from her. MH 18. Pierro was then "violently harassed," screamed at, and called names by "[s]everal citizens" who asked her if she "could do that in [her] bedroom." MH 15; *see also* MH 17-19. She answered, "[N]o, I can't do yoga on the beach in my bedroom." MH 15. People also came over to defend Pierro, including the woman with the child. MH 17-18. She told the people who were screaming at Pierro that Pierro was "not bothering [her] at all and [was] being very peaceful[,] and that the swearing [was] very inappropriate in front of children," MH 18.

In the meantime, several people had called the police and complained that a woman on the beach was "doing nude yoga" and "[e]xposing her breasts," and "that there were numerous children and families there." MH 35; *see also* MH 28. Sergeant Black[2] and Officer Holly Callahan went to investigate. MH 36, 38. As soon as Sgt. Black parked in the lot, "several groups" approached him, pointed at Pierro, and said that she had her nipples exposed. MH 36; *see also* MH 38-39, 41. Officer Callahan parked closer to the beach and as soon as she did so, several other people approached her and said that a woman "was doing topless yoga on the beach, ... that they were offended, and [that] they wanted [the officers] to take some kind of action." MH 60. The beach was crowded, so Officer Callahan asked them where the woman was and they also pointed at Pierro. MH 60.

As the officers walked toward Pierro, her back was to them, she was doing yoga poses near the lifeguard station, lots of adults and children were watching her, and a man was taking photographs from several feet away. MH 36, 41, 60. Officer Callahan walked around Pierro and realized that Pierro's nipples were in fact exposed. MH 60. The officers then introduced themselves, told Pierro she was violating the ordinance, and asked her to cover herself, but she

---

[2] Sgt. Black never gave his first name.

ignored them, so Sgt. Black warned her that they would arrest her for violating the ordinance if she did not do so. MH 43-44, 60-61. At that point, Pierro started talking "about case law that [said the police] were unable to enforce the city ordinance." MH 44-45. Officer Callahan then arrested and handcuffed her, Sgt. Black wrapped a towel around her, and they led her away. MH 44-45. As they did so, "a bunch of people began to clap." MH 45. Lilley, however, was "very distressed." MH 22.

On May 31, Lilley drove to the beach with Sinclair, who was wearing only a skirt. MH 10, 20. They then walked across the crowded beach topless and as they did so, many adults and children stared at them. MH 10, 50. Lilley then sat in a chair by the water and Sinclair went swimming and then lay on her stomach to sunbathe. MH 9-10, 20. Their purpose in being topless that particular day was to protest the ordinance and Pierro's arrest. MH 9-10, 22.

Sinclair had previously gone to the beach with her "nipples exposed" because it was "a lifestyle choice" and on those days, she "had [not] had any trouble." MH 10; *see also* MH 9. However, that day, police received numerous complaints, including one from Sandra Smith, a fifty-one-year-old Easter Seals staff member who was there with her disabled client, two other staff members, and their disabled clients. MH 48-50. Smith called because she knew it was not "proper and approved" for females to go topless in public in Laconia. MH 48. She also did not think it was "right" for them to do so because her religion and upbringing had taught her to be modest about her breasts and to keep her nipples covered in public. MH 53-54.

When officers arrived and told Sinclair that she needed to cover up or they would arrest her for violating the ordinance, she said, "[O]kay, I want you to arrest me." MH 11; *see also* MH 10. When they told Lilley the same thing, she said that she "was acting in a protest and that

[she] did not believe that [she] could be arrested for protesting." MH 22. The officers then arrested Sinclair and Lilley. MH 11, 22.

Lilley later protested the ordinance and her arrest and advertised her cause on social media, in the regular media, and on street corners where she held up signs. MH 25-26. She also went to a Laconia City Council meeting and asked the councilors to repeal the ordinance, but they did not do so. MH 23.

SUMMARY OF THE ARGUMENT

I. The trial court properly held that the portion of the Laconia public indecency ordinance that prohibits "the showing of the female breast with less than a fully opaque covering of any part of the nipple" in "public areas" does not violate the defendants' state or federal rights to equal protection because they never argued that the real differences analysis no longer applies or that topless males and topless females are similarly situated. Rather, the only evidence the trial court had the opportunity to consider proved that they are not, so the rational basis test applied. Furthermore, the defendants never argued that the ordinance could not survive rational basis review and, even if they had, numerous courts have held that a ban on females exposing their nipples in public serves compelling government interests, and that the societal impacts associated with that conduct are legitimate bases for that type of regulation. In any event, even if the ordinance is invalid, it was intended to apply only in a constitutionally permissible manner, so this Court can simply strike the word "female" from that portion and thereby make it valid.

II. The trial court properly found that the ordinance does not violate the defendants' right to free speech because they failed to demonstrate that their conduct was constitutionally protected. The only evidence the trial court had the opportunity to consider demonstrated that Pierro did not intend to convey a message, and that the viewing public had no way of knowing that the other defendants' conduct was intended to do so. Furthermore, the trial court properly held that the ordinance was content neutral, so the time, place, and manner test applied, and the defendants do not argue that the ordinance is not a valid restriction on the manner in which they may convey their message. Moreover, even if they had done so, the ordinance promotes several substantial government interests and is narrowly drawn to promote those interests.

III. The defendants' claim that that the ordinance is invalid on its face is not preserved, and even if it was, the trial court properly held that RSA 47:17, XIII (2012) gave the City the authority to enact the portion of the ordinance that applied to their conduct because it gives cities the authority to enact ordinances "to regulate the clothing to be worn by bathers and swimmers." Furthermore, RSA 47:17, II (2012) gives cities the authority to enact ordinances "to prevent any disturbance" and the evidence demonstrated that the ordinance's ban on females exposing their nipples in all public places is reasonably related to that purpose because females doing so causes disturbances, but males doing so does not. In addition, RSA 47:17, XV (2012) gives cities the authority to enact any ordinances "which seem for the well-being of the city." The evidence demonstrated that the ban on females exposing their nipples in public places is necessary for "the well-being of the city." Moreover, that ban is not "repugnant to the constitution or the laws of the state."

IV. The trial court properly found that the ordinance is not preempted by RSA 645:1 (2016) because it does not expressly contradict the statute or run counter to the intent underlying the statutory scheme. Furthermore, the trial court properly held that the ordinance does not violate RSA chapter 354-A because it does not prohibit females from being on public property, but instead, prohibits them only from being on public property topless. Moreover, the plain language of RSA 354-A:16 (2009) and RSA 354-A:17 (2009), the "public accommodation" statutes, prohibit only "persons" from discriminating on the basis of sex and apply only to a "place of public accommodation," but the beach is not a "place of public accommodation" as that term is defined by RSA 354-A:2, XIV (2009).

ARGUMENT

I. The trial court properly found that prohibiting only females from exposing their nipples in public does not violate equal protection because topless females are not similarly situated to topless males and the distinction drawn by the ordinance is rationally related to several important governmental interests.

The defendants were charged with violating § 180-2, A(3) of the ordinance. ADB 89, 91, 93. It provides, in relevant part, that it is "unlawful for any person to knowingly or intentionally, in a public place .... [a]ppear in a state of nudity." ASB 21. Section 180-4 defines "nudity" as "[t]he showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple." ASB 22. It defines a "public place," in relevant part, as "[a]ny public street, way, alley, parking area, park, common, beach or other property or public institution of the City." ASB 22-23. In addition, § 180-1 states:

> This article is adopted by the City of Laconia for the purpose of upholding and supporting the public health, public safety, morals and public order. The conduct prohibited hereunder is deemed to be contrary to the societal interest in order and morality. In addition, [it] has been widely found and is deemed to have harmful secondary effects in places and communities where it takes place, including crimes of various types and reduction of property values, not only in the immediate vicinity, but on a community-wide basis.

ASB 21.

In rejecting the defendants' claim that the charges had to be dismissed because the ordinance violates their state and federal constitutional rights to equal protection, the trial court held that those rights mandated "that all persons similarly situated are to be treated equally," and that the ordinance did not violate them because "it treat[ed] all females equally." ADB 28. It also found that the ordinance "on its face create[d] no classification as to the female body," so "the proper standard of review [was] intermediate." ADB 28. It next found that the evidence showed that "females baring their breasts in public ... [was] still seen by society, as unpalatable."

ADB 29. It then held, as the majority of courts have, that "[p]rotecting the public sensibilities is an important government interest based on an indisputable difference between the sexes," and that banning the display of female nipples is "substantially related to that interest" and "accomplished by [those] means." ADB 29 (quotations omitted).

On appeal, the defendants argue that the trial court erred for numerous reasons. They first argue that it erred because differences in appearance "should be of no legal consequence," "[m]edical science shows ... there is little [biological] distinction," "[a]ny distinction lacks a nexus to what Laconia is prohibiting," and distinctions "based upon religious or moral views" are "unrelated to actual biological differences." DB 13. They also argue that the trial court should have applied strict scrutiny because the "ordinance ... discriminates on gender/sex," that there is no "compelling governmental interest" because the "undisputed testimony" showed "that the health of the public was in no way in jeopardy" when they exposed their nipples, because there is no "rational basis to argue that [doing so can] affect the public's health," and because female nipples are "not inherently dangerous." DB 14. They then argue that "[r]egulating morals in a discriminatory fashion is not a *compelling government* interest," DB 14, and that even if "regulating morals" is, the standard cannot be based on the majority's opinion that certain conduct is either moral or immoral, DB 15.

The defendants next argue that the ordinance cannot be "necessary" because it is the "only [New Hampshire] topless [one] being enforced," the "conduct is not prohibited under state law," and "females regularly enjoy being topless in public [here]." DB 15. They also argue that there are less restrictive means to accomplish Laconia's stated goals because it can ban the display of all nipples or "put a sign on the beach telling people that topless sunbathing is legal ...

so they would be less outraged [or] scared ...." DB 16. They further argue that "[a] law subject to strict scrutiny is presumed unconstitutional." DB 17.

In addition, the defendants argue that federal courts apply "heightened intermediate scrutiny," DB 17, that two "have issued favorable decisions to women," DB 18 (citing *Free the Nipple—Fort Collins v. City of Fort Collins*, 237 F. Supp. 3d 1126 (D. Colo. 2017)); DB 19 (citing *Free the Nipple—Springfield Residents Promoting Equality v. City of Springfield*, 153 F. Supp. 3d 1037 (W.D. Mo. 2015)), and that a New York court has also done so, DB 20 (citing *People v. Santorelli*, 600 N.E.2d 232, 236 (N.Y. 1989) (Titone, J. concurring)).[3] They then argue that "[d]iscriminating based upon morals might not even survive a rational basis test" in light of a statement Justice O'Connor made in her concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003). DB 20 (citing *Lawrence*, 539 U.S. at 585 (O'Connor, J. concurring)).

In addition to supporting the defendant's arguments, the brief of the *amicus*, the ACLU-NH, raises several other arguments in support of its position that the ordinance violates the state and federal equal protection clauses. See AB 8-26. Several of the defendants' claims are not preserved, all of the ACLU-NH's additional claims are not preserved, and most of the documents and evidence they cite to and rely on in support of their claims are not properly before this Court. "The defendant[s], as the appealing part[ies], ha[ve] the burden to provide this [C]ourt with a sufficient record to decide [the] issues on appeal and demonstrate that [they] raised [them] before the trial court. Preservation of an issue for appeal requires a ... specific objection." *State v. Brooks*, 162 N.H. 570, 583 (2011) (quotations and citations omitted). "The trial court must have had the opportunity to consider any issues asserted by [them] on appeal; thus, to satisfy this preservation requirement, any issues that could not have been presented to [it] before its decision

[3] The defendants did not indicate that the part of the case they rely on is the concurring opinion.

must be presented to it in a motion for reconsideration." *State v. Mouser*, 168 N.H. 19, 27 (2015); *see also N.H. R. Crim. P.* 43(a). In addition, on appeal, this Court will "consider only evidence and documents presented to the trial court." *Flaherty v. Dixey*, 158 N.H. 385, 387 (2009) (citing *Sup. Ct. R.* 13; *Lake v. Sullivan*, 145 N.H. 713, 717 (2001)). Here, the trial court never had the opportunity to consider several of the defendants' arguments, any of the ACLU-NH's additional arguments, or the majority of the documents and evidence they cite to and rely on in their briefs.

In their motion to dismiss, the defendants said, "The State cannot show [that] the ordinance is necessary to achieve a compelling State interest, is narrowly tailored[,] not unduly restrictive nor unreasonable, and is the least restrictive means. One less restrictive means available would be to prohibit everyone from showing their nipple[s] and not just females." ADB 20. They then reiterated those claims at the hearing. MH 68-69. However, they never explained why the ordinance was not necessary or narrowly tailored or suggested any other less restrictive means. *See* DB 15-16; AB 16. They also never argued that legislation is presumed invalid under strict scrutiny, *see* DB 15; AB 9, that another court had rejected the same mental health risk to children argument, or that expert testimony is required to establish that the conduct poses a risk to children's mental health, *see* AB 15.

Furthermore, the defendants never argued that *Michael M. v. Sonoma Superior Court*, 450 U.S. 464 (1981), is no longer good law, that the "real differences" analysis does not apply under the state constitution, or that it is subject to greater rigor under strict scrutiny. *See* AB 20-21. They also never argued that there are no physiological or biological differences between male and female nipples, or that distinctions based on moral views are unrelated to them. *See* DB 13; AB 21. In fact, they never said "biology" or "biological" and they elicited evidence that

there are in fact several real differences, including that only women can breastfeed, and that most people can distinguish between male and female breasts and nipples. MH 34, 59.

In addition, although the defendants argued that the "*city council*[] should [not] just be able to broadly assert something," MH 70 (emphasis added), they were discussing whether it had "authority for this [ordinance]," MH 69, and in doing so, they argued that if it was their burden to show that "it did [not] meet that," they had, MH 70. However, they never argued that the State had to "furnish some actual evidence to substantiate the interest pursued by the law, explain how [it] relates to the interest," AB 14, and "establish[] a link between the regulated activity and harmful secondary effects," AB 19. They also never argued that the ordinance could not survive rational basis review, *see* DB 20, or that it was "facially invalid," *see* AB 3, 5, 11. Therefore, none of the foregoing claims are preserved because the trial court never had an opportunity to consider them. That being the case, this Court should also not consider them. *See State v. Blackmer*, 149 N.H. 47, 49 (2003) (this Court will not address unpreserved claims).

Moreover, in the trial, the defendants never admitted any documents or cited to any medical or scientific studies, police emails or memoranda, or internet studies or posts. Instead, they cited to and relied on only New Hampshire newspaper articles about Free the Nipple, ADB 16, the text of 2016 HB 1525-FN and 2016 SB 347, and the fact that they were "deemed inexpedient to legislate," ADB 16-17. Therefore, the additional documents and evidence they and the ACLU-NH now cite to and include in their appendices are not properly before this Court because the trial court never had an opportunity to consider them. That being the case, this Court will also not consider them.[4] *See Flaherty*, 158 N.H. at 387 ("to the extent either party relies

[4] This Court does consider legislative history, including new or additional legislative history, when it interprets statutes, but it does so "only if the statutory language is ambiguous." *State v. Wilson*, 169 N.H. 755, 767 (2017). Here, the defendants and the ACLU-NH use the legislative history of the ordinance as

upon documents or evidence not presented to the trial court, [this Court] will not consider them").

In addition, in their brief, the defendants have not used the words "face" or "facial" or argued or demonstrated that "no set of circumstances exists under which the [ordinance] would be valid." *State v. Hollenbeck*, 164 N.H. 154, 158 (2012) (quotation omitted) (setting forth the defendant's burden in a "facial challenge"). In fact, in their free speech argument, they explicitly state that because "any breastfeeding exemption would not apply to [them], they are not seeking to invalidate the ordinance for its failure to exempt breastfeeding." DB 26 n.59. Therefore, it is clear that they are raising only an "as applied" challenge to the ordinance.

In any event, the trial court did not err in denying their motion because the ordinance does not violate equal protection on its face or as applied. In reviewing the trial court's order, this Court will "uphold the trial court's factual findings and rulings unless they lack evidentiary support or are legally erroneous." *Jesurum v. WBTSCC Ltd. Partnership*, 169 N.H. 469, 476 (2016). It will also "defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence." *Id.* It will "review the trial court's application of the law to the facts *de novo*." *Id.*

Here, the trial court held that the ordinance does not violate equal protection because "it treats all females equally." ADB 28. In other words, it made a factual finding that when it comes to public nudity, females are similarly situated to each other, but are not similarly situated to males. It also made a factual finding that "females baring their breasts in public ... is still seen by society, as unpalatable." ADB 28. As demonstrated above and in the statement of facts to

---

evidence that the City did not actually have the interests and purposes it unambiguously set forth in the ordinance in mind when it adopted the ordinance. Therefore, this Court should not consider that history.

this brief, the only evidence the trial court had the opportunity to consider supported those findings. Therefore, this Court must defer to them.

It should also be noted that the ACLU-NH's reliance on *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000), *Rideout v. Gardner*, 838 F.3d 65, 67-69 (1st Cir. 2016), *Foxxxy Ladyz Adult World, Inc. v. Village of Dix, Ill.*, 779 F.3d 706 (7th Cir. 2015), and *Guare v. State*, 167 N.H. 658 (2015), in support of its "actual evidence" claims, AB 13, 18, is misplaced because those cases did not address claims that governmental action violated equal protection. Instead, they addressed claims that it violated fundamental rights. *See Pap's A.M.*, 529 U.S. at 283 (addressing whether an ordinance prohibiting public nudity violated the First Amendment); *Foxxxy Ladyz Adult World, Inc.*, 779 F.3d at 711 (addressing whether a ban on nude dancing, *i.e.*, "expressive conduct," violated the First Amendment); *Rideout*, 838 F.3d at 67-69 (addressing whether the "ballot selfie" law violated the First Amendment); *Guare*, 167 N.H. at 660-61 (addressing whether language in the voter registration form violated the state constitutional right to vote).

Furthermore, "[t]he secondary effects analysis ... is appropriate [only] when the regulation at issue is content based, *i.e.*, is directed at *speech* rather than conduct ...." *Bushco v. Utah Tax Comm'n*, 225 P.3d 153, 164 (2009). On the other hand, if it is conduct based, "there is no need ... to evaluate the expressed interest ...." *Id.* Here, the application of the ordinance "is triggered by nudity, which the Supreme Court has specifically declared 'is not an inherently expressive condition.'" *Id.* (quoting *Pap's A.M.*, 529 U.S. at 289). Therefore, the ordinance is conduct based, the secondary effects analysis does not apply, and there is no need to evaluate the City's expressed interests.

Moreover, in cases addressing equal protection claims, this Court has held that "the government may not rely upon justifications that are hypothesized or invented *post hoc* in response to litigation, nor upon overbroad generalizations." *Cmty. Res. For Justice v. City of Manchester*, 154 N.H. 748, 762 (2007). The Supreme Court has also held that "[i]t will not do to hypothesize or invent governmental purposes for gender classifications *post hoc* in response to litigation." *Sessions v. Morales-Santana*, 198 L. Ed. 2d 150, 170 (2017). Therefore, it appears that the actual evidence requirement applies in this context only where justifications and purposes are "hypothesized or invented *post hoc* in response to litigation," which is not the case here because the justifications and purposes for the ordinance are explicitly stated in it.

It is also worth noting that the legislative history of the ordinance includes only the City Council's meeting minutes, which are merely a summary, and the written materials submitted to the Council. Therefore, the fact that it does not include detailed discussions about the Council's stated purposes for prohibiting the conduct or the evidence it relied on in concluding that the conduct had been "widely found ... to have harmful secondary effects," ASB 21, does not compel a finding that those discussions did not occur, that the evidence did not exist, or that the Council hypothecated or invented those purposes and findings. Instead, in the absence of any evidence that it did so, this Court should take the Council at its word.

In any event, even if the secondary effects analysis did apply to equal protections claims, the State was not required to meet it here because the "real differences" analysis does apply and females and males are not similarly situated under these circumstances. In *In re Sandra H.*, 150 N.H. 634 (2004), this Court "clarified [its] analysis under the State Constitution." *Id.* at 639. In doing so, it said:

> Holding that persons who are not similarly situated need not be treated the same under the law is a shorthand way of explaining the equal protection guarantee.

> Whether applying a strict scrutiny, intermediate, or rational basis standard of review, we, as well as the federal courts, determine whether differences between the classes justify disparate treatment under the law.
>
> The Federal and State Equal Protection Clauses do not "demand that a statute necessarily apply equally to all persons or require things which are different in fact to be treated in law as though they were the same." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) (quotation omitted). Where a classification "realistically reflects the fact that the two groups are not similarly situated in certain circumstances," and the legislation's differing treatment of [them] is sufficiently related to a government interest, it will survive an equal protection challenge. *See id.* at 472-73.
>
> In some of our past decisions where we initially evaluated whether persons were similarly situated, we utilized different language than do the federal courts to achieve the same result under a rational basis test. Our "similarly situated" analysis focused on the dissimilarities of the classes, which were self-evidently a basis for reasonable classification. In those decisions, we discussed the differences between the classes and concluded that they were not similarly situated, which justified the difference in treatment under the law. We were applying the same equal protection standard of review, *i.e.*, rational basis, as the federal courts would apply. Thus, although the language in some of our past decisions varied from that used by federal courts, our State equal protection analysis is identical.

In re Sandra H., 150 N.H. at 637-39 (brackets omitted). Therefore, it is clear that the real or actual differences analysis applies under the state constitution, and that, unless the law treats similarly situated persons differently based solely on the fact that they are members of a suspect class, the rational basis test applies.

Furthermore, although the ACLU-NH broadly asserts that *Michael M.* may no longer be good law in light of more recent federal authority, the defendants have not raised or briefed that claim and the ACLU-NH has neither mentioned nor addressed the *stare decisis* factors in doing so. Therefore, this Court should decline to reconsider its precedent. *See State v. Slayback*, No. 2015-0074, order at 5 (N.H. Nov. 18, 2015) (non-precedential 3JX order) ("Although the defendant discusses cases from other jurisdictions addressing this issue in various ways, he has failed to brief the *stare decisis factors*," so "we decline to reconsider our precedent.")

In any event, in *Morales-Santana*, which was decided in 2017, the Supreme Court said that it "has viewed with suspicion laws that rely on overbroad generalizations about the *different talents, capacities, or preferences of males and females*" and has "recognized that if a statutory objective is to exclude or protect members of one gender in reliance on fixed notions concerning that gender's *roles and abilities*, the objective itself is illegitimate." *Morales-Santana*, 198 L. Ed. 2d at 165 (emphasis added). However, it did not mention or cite to *Michael M.*, presumably because the distinction drawn in *Michael M.* was based on actual physiological differences between the sexes, rather than on fixed notions concerning their differing talents, capacities, preferences, roles, or abilities. *See Michael M.*, 450 U.S. at 472-73 ("Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by mature, suffers few of the consequences of his conduct."). Therefore, it is also clear that the real differences analysis still applies under federal law.

Furthermore, although this Court does not appear to have addressed the issue of which party bears the burden in that analysis, federal case law makes it clear that the party "claiming an equal protection violation must first identify and relate *specific instances* where persons *situated similarly in all relevant aspects* were treated differently." *Cordi-Allen v. Conlong*, 494 F.3d 245, 251 (1st Cir. 2007). Case law from jurisdictions that apply strict scrutiny to gender- or sex-based classifications also makes it clear that the party claiming an equal protection violation must make "a sufficient showing to trigger strict scrutiny review," *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5, 28 (Ct. App. 2001), and that in order to do so, they "must show [that it] discriminates based solely on gender" and "must rebut any evidence that physical characteristics require the

distinctions," *MJR's Fare v. Dallas*, 792 S.W.2d 569, 575 (Tex. App. 1990). Here, the defendants did not meet that initial burden.

In their motion, the defendants conceded that "the female nipple is treated different than the male nipple ... for social norms," ADB 19, and, at the hearing, Sinclair testified that "we hypersexualize ... the nipple[s] of females" and "consider them pornographic," MH 8. Pierro then agreed with her that "society ... views the naked female ... nipple in a sexualized manner." MH 17-18. The defendants then elicited evidence from the officers that there are several physiological differences between male and female breasts and nipples, including that only women can breastfeed, MH 34, and that they also differ in appearance, MH 34, 59. In other words, they "introduced undisputed ... testimony that (1) physiological and sexual distinctions exist between the male and female breast; (2) female breasts differ both internally and externally from male breasts; and (3) the female breast, but not the male breast, is a mammary gland." *MJR's Fare*, 792 S.W.2d. at 575. Therefore, they failed to meet their "burden of proving that the law discriminate[s] against females solely on the basis of gender." *Id.* That being the case, the rational basis test applies here. *In re Sandra H.*, 150 N.H. at 638.

Under that test, "legislation [need] be only rationally related to a legitimate governmental interest." *Boulders at Strafford v. Town of Strafford*, 153 N.H. 633, 641 (2006); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (same). Here, the defendants argue that "[d]iscriminating based upon *morals* might not even survive a rational basis test." DB 20. However, they have not explained why that is so. Instead, they have simply quoted language from Justice O'Connor's concurring opinion in *Lawrence.* DB 20 (quoting *Lawrence*, 539 U.S. at 585 (O'Connor, J. concurring)). Therefore, even if they had preserved that claim, this Court should decline to consider it because it is insufficiently briefed to warrant this Court's

consideration. *See State v. Durgin*, 165 N.H. 725, 731 (2013) ("judicial review is not warranted for complaints regarding adverse rulings without developed legal argument"); *Blackmer*, 149 N.H. at 49 (this Court will not address unpreserved or insufficiently briefed claims).

Furthermore, although Justice O'Connor did state that "[a] law branding one class of person as criminal based solely on the State's moral disapproval of that class and the conduct associated with [it] runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review,'" she was discussing a law that prohibited sodomy only between same-sex couples, *Lawrence*, 539 U.S. at 583 (O'Connor, J. concurring), *i.e.*, that deprived them of the fundamental right to engage in private consensual sexual activity based solely on moral disapproval of their class and "conduct that is closely correlated with [it]," *id.* at 585. Here, the law does not deprive females of a fundamental right based solely on moral disapproval of females or conduct that is closely correlated with being female. Instead, it prohibits females only from exposing there nipples in public, which is neither a fundamental right nor conduct that is closely correlated with being female. Therefore, contrary to the ACLU-NH's claim, "'[m]oral disapproval' of individual conduct has [not] been unambiguously foreclosed as a sufficient argument to justify discriminatory laws." AB 22 (citing *Lawrence*, 539 U.S. at 582-83).

In any event, protecting public safety, public health, and public order are important governmental interests. *McCullen v. Coakley*, 571 F.3d 167, 174 (1st Cir. 2009). The defendants argue that "[t]he display of a female nipple is ... not a public safety issue as the female nipple is not inherently dangerous." DB 14. However, "because female breasts generally have been regarded in society as an erogenous zone, women are at a far greater risk than men of being subjected to unwanted sexual touching on their breast. Accordingly, there is a compelling

government interest in protecting females from the non-consensual touching of their breasts and the ... [law] is narrowly tailored to further [it]." *People v. Carranza*, No. B240799, 2013 Cal. App. Unpub. LEXIS 5242 at *28 (July 24, 2013).

Furthermore, prior to the enactment of the ordinance, "numerous courts ha[d] recognized that the societal impacts associated with female toplessness are legitimate bases for regulation." *Buzzetti v. City of New York*, 140 F.3d 134, 142-43 (2d Cir. 1998) (citing *United States v. Biocic*, 928 F.2d 112, 115-16 (4th Cir. 1991); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1279-80 (5th Cir. 1988), *cert. denied,* 489 U.S. 1052 (1989); *Tolbert v. City of Memphis*, 568 F. Supp. 1285, 1290 (W.D. Tenn. 1983)). Courts had also recognized that providing recreational space, including beaches, to all citizens is "an important government interest," and that laws prohibiting public nudity advance that interest because people disturbed by nudity, including females going topless, may avoid places where it takes place. *Craft v. Hodel*, 683 F. Supp. 289, 293 (D. Mass. 1988) (citing, *e.g.*, *People v. Hollman*, 500 N.E.2d 297, 301 (N.Y. 1986)). Therefore, it is clear that the ordinance's ban on females exposing their nipples in public is "rationally related to [more than one] legitimate governmental interest." *Boulders at Strafford*, 153 N.H. at 641.[5]

Moreover, it is worth noting that at least three state statutes distinguish between male and female nipples. RSA 571-B:2 (2001) makes it a crime to provide a minor with depictions or descriptions of "sexual conduct," which RSA 571-B:1 (2001) defines as "any touching of the genitals, public areas or buttocks of the human male or female, or *the breasts of the female* ...."

---

[5] It is also worth noting that the State could not find any case in which a court has struck down a law that distinguishes between male and female nipples, and that the defendants' reliance on *Free the Nipple—Fort Collins, Free the Nipple—Springfield Residents Promoting Equality*, DB 19, and *Santorelli*, is misplaced. In the first case, the court held only that the "plaintiffs ha[d] demonstrated a strong likelihood that they [w]ould succeed at the permanent injunction trial." *Free the Nipple—Fort Collins*, 237 F. Supp. 3d at 1133. In the second case, the court could not decide the issue "because (1) the procedure posture preclude[d] [it] from making factual findings about Defendant's intent, and (2) [her intent] ... remain[ed] a potential issue." *Free the Nipple—Springfield Residents Promoting Equality,* 153 F. Supp. 3d at 1047. In the third case, the majority expressly declined to reach the issue. *Santorelli*, 600 N.E.2d at 233-34.

(Emphasis added.) RSA 644:9, I(a) (2016) makes it a crime to install or use a "device for the purpose of observing, photographing, recording, amplifying, broadcasting, or in any way transmitting images or sounds of the private body parts of a person including the genitalia, buttocks, or *female breasts* ...." (Emphasis added.) RSA 644:9-a, II, III (Supp. 2016) then make it a crime to obtain or disseminate, without consent, images of "intimate parts," which RSA 644:9-a, I(c) defines as "the fully unclothed, partially unclothed, or transparently clothed genitals, pubic area, or anus, or, *if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing.*" (Emphasis added.) Therefore, it is clear that the legislature has also concluded that there are actual or real differences between male and female breasts, and that only females' breasts are private, sexual parts. That being the case, if the ordinance at issue here violates equal protection, those statutes also do so.

It is further worth noting that RSA 132:10-d (2015), provides: "Breast-feeding a child does not constitute an act of indecent exposure and to restrict or limit the right of a mother to breast-feed her child is discriminatory." The ACLU-NH appears to interpret that language as giving females the right to knowingly or intentionally expose their nipples in public while breastfeeding. AB 26. However, it does not do so and the legislative history of the statute makes it clear that the legislature did not intend for it to do so. When the 1999 bill that created the statute was introduced, it proposed that the statute say:

> Notwithstanding any provision of the law to the contrary, a mother is entitled to breastfeed her child in any location where the mother is otherwise authorized to be. Breast-feeding a child does not constitute an act of indecent exposure and to restrict or limit the right of a mother to breast-feed her child in any location she is otherwise authorized to be is discriminatory.

ASB 43. However, the bill was then amended and the statute, as enacted, contained only the current statutory language. ASB 46.

In 2007, a bill was introduced that would have added "public nudity" and "disorderly conduct" after the words "indecent exposure," ASB 49, but it failed to pass the House, ASB 47. In 2013, a bill was introduced that would have explicitly allowed women to breastfeed "in any place open to the public" and explicitly prohibited any "person" from directing her "to move to a different location" or "cover her child," ASB 53-54, but it was tabled, ASB 51-52. Then, in 2015, a bill was introduced that would have added the "authorized location" language from the 1999 bill, the "move to a different location" language from the 2013 bill, and language extending that prohibition to government entities, ASB 58-59, but it was tabled and died, ASB 57. Therefore, to the extent that the legislature's failure to legislate says anything about its intent, it is clear that it did not intend for the statute to authorize women to knowingly or intentionally expose their nipples while breastfeeding in public, to prohibit municipalities from prohibiting them from doing so, or to prohibit anyone from asking them to move or cover up while doing so.

Moreover, although the ACLU-NH argues that "this Court [cannot] rewrite the ordinance to make it more narrowly tailored," AB 26, it does not explain why that is so or cite to any law in support of that claim. Therefore, this Court should not consider that claim because it is insufficiently briefed to warrant this Court's consideration. *See Durgin*, 165 N.H. at 731; *Blackmer*, 149 N.H. at 49.

In any event, the ordinance states that "it is the declared intention to apply [it] in a constitutionally permissible manner." ASB 23. Therefore, there is no reason why this Court cannot simply strike the word "female" from the part of the ordinance at issue here, which is the only "least restrictive means" the defendants mentioned or suggested in the trial court.

II. The trial court properly found that the ordinance does not violate the defendants' right to free speech because Pierro did not intend to convey a message, and even if she did, the public had no way of knowing that she, Sinclair, or Lilley intended to convey a message by exposing their nipples in public.

In rejecting the defendants' claim that the charges had to be dismissed because the ordinance violates their state and federal constitutional rights to free speech, the trial court held that there was "no evidence that the ordinance inhibited the effectiveness of their ability to express their opinion," and that it left "open ample alternative channels" where they could do so. ADB 30 (quotation and ellipsis omitted). It also held that "[t]he ordinance is ... conduct based," ADB 30, and that it "is not impermissibly restrictive," ADB 31. It next held that the argument that people who objected could go elsewhere lacked merit because the ban applied at "a public facility," which was defined to include the beach, "presumptively, due to the geographically limited nature of access to the lake," because "the presence of children is [a] valid consideration," and because "there are ample alternatives for the Defendants to promote their views." ADB 31. It then noted that other courts had held that, unlike nudity in the privacy of one's home and in the context of artistic expression, nudity in public while swimming or sunbathing is not "constitutionally protected activity" or "a right of Constitutional dimensions." ADB 31 (quotations omitted).

On appeal, the defendants argue that it erred in doing so for several reasons. They first argue that their conduct was constitutionally protected because they intended to convey a message by exposing their nipples, DB 21, and doing so "enhance[d]" and was "an integral part of" their "message/movement," which "was likely recognized given the significant media coverage [and] any discussions [they] may have had with the City of Laconia and [its] police department," DB 22 (citing ADB 50-60). They also argue that "[t]he expression of the female nipple ... contains artistic value." DB 22. They further argue that the ordinance is content-based,

so a "[t]ime, place, and manner analysis is not appropriate" and the "[s]trict scrutiny analysis ... in *Texas v. Johnson*[,] 491 U.S. 397 (1989), is the appropriate standard." DB 23.

In addition, the defendants argue that "[a]ny content based restriction is presumptively invalid," that their "mode of communication involved a public forum," DB 25, that the State had to demonstrate their speech fell within "one of very few unprotected categories," DB 25, and that a female nipple cannot be obscene, DB 26. They also argue that there is a "problem related to enforcement of the ordinance" because it would not be enforced "again pre-pubescent females" whose "nipples would essentially be identical to [those of] post-pubescent female[s]," DB 26, because some females nipples appear to be male nipples and *vice versa*, DB 26-27, and because "it is impossible for an officer to distinguish a male nipple from a female nipple," DB 27.

As with the first issue, the ACLU-NH has briefed those arguments and several additional arguments the defendants did not brief. Several of the defendants' claims are not preserved, all of the ACLU-NH's additional claims are not preserved, and most of the documents and evidence they cite to in support of their claims are not properly before this Court. In the trial court, the defendants never argued that a narrow, articulable message is no longer a condition precedent to constitutional protection. *See* AB 27-28. In fact, they do not do so on appeal. Instead, they argue, as they did in the trial court, that their message was "likely recognized." ADB 19; DB 22. They also never argued that content-based restrictions are presumptively invalid, *see* DB 25; AB 31, that all nipples are "essentially identical," DB 26, that there are problems with enforcement of the ordinance, *see* DB 26-27, that it is overbroad, *see* AB 34-35, that it is invalid on its face, *see* AB 35, or that there are any less restrictive alternatives other than banning the display of all nipples, *see* AB 34.

In addition, as demonstrated in § I of this brief, they never admitted any documents, cited only to newspaper articles about Free the Nipple, and set forth only the text of 2016 HB 1525-FN and 2016 SB 347 and the fact that they were voted inexpedient to legislate. Therefore, none of the foregoing claims are preserved and the additional documents and evidence they now cite to and rely on are not properly before this Court because the trial court never had an opportunity to consider them. That being the case, this Court should not consider those claims, *see Blackmer*, 149 N.H. at 49, and it will not consider those documents and evidence, *see Flaherty*, 158 N.H. at 387.

Furthermore, although the defendants mention part I, article 22 of the New Hampshire Constitution in passing in their brief, DB 21, they also argue that the "[s]trict scrutiny analysis as used in *Texas v. Johnson*, 491 U.S. 397 (1989), is the appropriate standard," DB 23, and then rely solely on federal case law in briefing their claims, DB 23-27. Therefore, to the extent that they are raising a state constitutional claim, this Court should decline to consider it because it is insufficiently briefed to warrant this Court's consideration. *See State v. Oakes*, 161 N.H. 270, 278 (2010) ("Because the defendant has not developed his constitutional arguments, we decline to address them." (Quotation omitted.)).

In any event, this Court has held that the same analysis applies under either constitution. *See State v. Bailey*, 166 N.H. 537, 542-43 (2014). Under that analysis,

> [w]hen assessing whether government restrictions impermissibly infringe on free speech, [this Court will] (1) assess whether the conduct or speech at issue is protected by the State Constitution, (2) identify the nature of the forum in order to determine the extent to which the government may limit the conduct or speech, and then (3) assess whether the justifications for restricting the conduct or speech satisfy the requisite standard. [It will] address each step in turn.

Bailey, 166 N.H. at 540-41 (quotations, citations, and brackets omitted). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment

into play, [the Supreme Court has] asked whether 'an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.'" *Johnson*, 491 U.S. at 404 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

The ACLU-NH argues that several federal circuit courts have loosened or eliminated the "particularized message" prong of that test in light of the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and suggests that this Court should also do so. AB 27-28. However, the Supreme Court has explained that "[t]he expressive nature of a parade was central to [its] holding in *Hurley*." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) (citing *Hurley*, 515 U.S. at 568). Here, the defendants' protest was not a part of a parade or organized protest that would have shed light on their intentions or their message, so this Court should continue to apply the "particularized message" prong of the test in this context.

In any event, the ACLU-NH does not argue that the intent to convey a message is no longer a condition of constitutional protection, and it explicitly notes that "[a]ccording to the 11th Circuit, a court should now consider whether a 'reasonable person would interpret the conduct at issue as some sort of message.'" AB 28 n.11 (brackets omitted) (quoting *Holloman ex rel. Holloman v. Harland*, 270 F.3d 1252, 1270 (11th Cir. 2004)). Here, the defendants argue that they intended to convey a message, DB 21, and that their "message/movement was likely recognized given the significant media coverage [of the Free the Nipple Movement] as well as through any discussions [they] may have had with the City of Laconia and their police department," DB 22. However, Pierro never testified that she intended to convey a message, that she was part of the movement, that she knew about it, that she spoke to the police before the day

she was arrested, or that she was protesting. Instead, she testified that her "purpose was to enjoy the beach," MH 15, that she "believe[d she] was providing [a] very healthy example of being human," MH 17, and that she told the police she did not think they could enforce the ordinance, MH 44-45. Therefore, her claim fails as a matter of law.

Furthermore, although Sinclair and Lilley testified that they were members of the movement, and that their purpose in being topless on that day was to protest the ordinance and Pierro's arrest for violating it, MH 9-10, 22, Sinclair also testified that she had gone to the beach topless on other days because it was her "lifestyle choice," MH 9. In addition, they both testified that they did not have contact with anyone on the beach other than the police, MH 10, 23, and Lilley testified that she told the police she was protesting after they threatened to arrest her, MH 22. However, there was no evidence that they talked to the police before that day, that the people on the beach had heard of the movement, that those people or the arresting officers knew they were part of the movement, or that those people or the arresting officers knew or had any reason to believe they were protesting or trying to convey a message before Lilley told the officers she was protesting. Therefore, there is no basis to conclude that a "reasonable person" would have interpreted their conduct "as some sort of message," *Holloman*, 270 F.3d at 1270.

It is also worth noting that in *Free the Nipple—Fort Collins*, the plaintiffs protested a similar ordinance by standing on a street corner with their nipples "covered by opaque dressings," *Free the Nipple—Fort Collins*, 216 F. Supp. 3d at 1260, and then challenged it on First Amendment grounds and argued "that the message of their nudity [was] evident because a hallmark of the Free the Nipple national movement is nudity," *id.* at 1263. In rejecting that claim, the court noted that "the Supreme Court has reasoned [that] if the specific message one's nudity is meant to convey would not be understood without accompanying explanatory speech,

that is 'strong evidence that the conduct a[t] issue is not so inherently expressive that it warrants protection.'" *Id.* (brackets and ellipsis omitted) (quoting *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. at 66). It then held that the plaintiffs' argument was not persuasive because "[a] casual observer of a Free the Nipple protest would first have to recognize that the topless individuals were in fact protestors and members of Free the Nipple (presumably through some form of signage, verbal communication, or a news article) in order to understand what [their] nudity was intended to convey." *Id.* at 1264.

Here, as demonstrated above, casual observers of the defendants' conduct had even less reason to understand what message their nudity was intended to convey because they were on a beach, rather than on a street corner where protests are common, and were sitting, swimming, sunbathing, and doing yoga, rather than engaging in an organized protest. Therefore, contrary to their claim, their conduct was not "protected expression." DB 27.

Moreover, even assuming that it was, "a restriction is content based only if it is imposed because of the content of the speech, and not because of offensive behavior identified with its delivery." *Hill v. Colorado*, 530 U.S. 703, 737 (2000). Here, the ordinance is content neutral because it "simply does not forbid the statement of any position on any subject" or "declare any view as unfit for expression ...." *Hill*, 530 U.S. at 737. Instead, it forbids only females baring their nipples in public while delivering their message. In other words, it merely controls the "manner" in which they do so. Therefore, it is "properly viewed ... as content-neutral time, place, and manner regulation." *Buzzetti*, 140 F.3d at 140; *see also, e.g.*, *Craft*, 683 F. Supp. at 293; *Eckl v. Davis*, 124 Cal. Rptr. 685, 694-95 (Ct. App. 1975); *State v. Turner*, 382 N.W.2d 252, 253-54 (Minn. Ct. App. 1986).

Here, the defendants do not argue that the ordinance is not a valid time, place, and manner restriction. DB 21-27. Instead, they argue that the "analysis is not appropriate" because "it is a content-based restriction," and that it is not a "time" or "place regulation." DB 23. Therefore, they have waived any claim that it is not a valid "manner restriction." *See In re Willeke,* 169 N.H. 802, 808 (2017) ("any issues raised in the notice of appeal, but not briefed, are deemed waived").

In any event, in order to be a "reasonable ... manner restriction," the ordinance "must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels for communication." *Bailey*, 166 N.H. at 543 (quotations omitted). Here, the ACLU-NH argues that "the interests enumerated by the ordinance ... fail to constitute 'important' or 'significant' interests .... because, beyond abstract notions of morality, the State has proffered little evidence justifying the significance of these proffered interests." AB 33. However, as previously addressed, that claim is not preserved. Even if it was, as demonstrated in § I of this brief, evidence is required only if the purposes and justifications for the "gender classifications" are "hypothesize[d] or invent[ed] ... *post hoc* in response to litigation," *Morales-Santana*, 198 L. Ed. 2d at 170, the secondary effects analysis applies only to content-based regulations, and under the standard for content-neutral regulations, "there is no need ... to evaluate the expressed interest," *Bushco*, 225 P.3d at 164. Therefore, the State did not have to proffer evidence to substantiate the interests and justifications stated in the ordinance.

Furthermore, "a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion ... may form an adequate predicate to the adoption of a secondary effects ordinance ...." *Daytona Grand, Inc. v. City of Daytona Beach,* 490 F.3d 860, 881 (11th Cir. 2007)). Here, before the City adopted the ordinance, every court that had

considered an identical or similar law had held that it was valid because it served important or "substantial government interests," including "preventing crime, maintaining property value, and preserving the quality of ... life and the character of ... neighborhoods," *Buzzetti*, 140 F.3d at 140 (quoting *Renton v. Playtime Theatres*, 475 U.S. 41, 51 (1986)), "promoting public morals," *Eckl*, 124 Cal. Rptr. at 831, preserving public safety and public order, *McCullen*, 571 F.3d at 174; and providing recreational space to all citizens, *Craft*, 683 F. Supp. at 293. Therefore, it is clear that the City had an adequate basis to adopt the ordinance.

The ACLU-NH also argues that the "ordinance is not a 'close fit' to the interests it purports to serve because .... Laconia could advance [them] ... with far less restrictive means ...." AB 34. However, it is well established that "a regulation of the time, place, or manner of protected speech ... need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989) (footnote and citation omitted). "It is [also] well-established that a nudity ordinance that imposes a minimum requirement of ... pasties is narrowly tailored ...." *Daytona Grand, Inc.*, 490 F.3d at 885. Here, as demonstrated above, the ordinance promotes several substantial governmental interests. It also imposes only a minimum requirement of pasties. Therefore, it is narrowly tailored to promote substantial government interests.

The ACLU-NH further argues that "circumstances that unnecessarily come within the ordinance's scope include, but are not limited to, breastfeeding and changing a female child's top after it is stained," AB 35, *i.e.*, that the ordinance is "overbroad." Even if that claim had been preserved, the defendants "are not seeking to invalidate the ordinance for its failure to exempt breastfeeding," DB 26 n.58, and as demonstrated in § I of this brief, RSA 132:10-d neither gives

a woman a right to knowingly or intentionally expose her nipples while breastfeeding in public nor prohibits municipalities from making it unlawful for her to do so.

Moreover, "the overbreadth of a statute must be real and substantial, judged in relation to the statute's plainly legitimate sweep." *State v. Brobst*, 151 N.H. 420, 421 (2004) (quotation omitted). Thus,

> [i]f a [law] is found to be substantially overbroad, [it] must be invalidated unless the court can supply a limiting construction or partial invalidation that narrows the scope of the [law] to constitutionally acceptable applications. If, on the other hand, if [it] is not substantially overbroad, then whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Id. (quotations and citations omitted). Here, it cannot be said that the ordinance's failure to exclude breastfeeding or changing female children's tops renders it "substantially overbroad" because those are not constitutionally protected activities. Even if it does, the ordinance explicitly states that if "any prohibition under [it] is declared overbroad by a court of competent jurisdiction, it is the declared intention to apply [it] in a constitutionally permissible manner." ASB 23. Therefore, this Court "can supply a limiting construction ... that narrows the scope of [it] to constitutionally acceptable applications." *Brobst*, 151 N.H. at 421.

III. The trial court properly found that the city had the authority to enact the portion of the ordinance that applied to the defendants' conduct because RSA 47:17, XIII specifically authorizes cities to regulate the clothing worn by bathers and swimmers.

In rejecting the defendants' claim that the charges against them had to be dismissed because the City lacked the authority to enact the ordinance, the trial court found "that the regulatory powers of the city are designated in RSA 47:17, XIII, in regulating 'times and place of bathing and swimming in the water of the city and the clothing to be worn by bathers and swimmers,'" and that the "authorizing legislation is consistent with the cited, Judicial recognition of *State v. Grant*[,107 N.H. 1 (1966),] and its progenies." ADB 28. It also found that although it

had struck down a similar Gilford ordinance and the defendants were urging it to "adopt a continuation of [that] ruling as the legislature ha[d] recently declined to remedially address what was perceived as flawed [j]udicial ruling," this Court has held that "the failure to enact 'is not legislative action in this area ....'" ADB 28 (quoting *Dover News, Inc. v. City of Dover*, 117 N.H. 1066, 1069 (1977)). It then found "that the validity of the regulatory action [here was] clearer than [it was] ... in Gilford." ADB 31.

On appeal, the defendants argue that "the mere display of the nipple does not meet the criteria of RSA 47:17, II," and that it "cannot be interpreted in a way that is overbroad and invades constitutional rights of Equal protection and Free Speech/Expression." DB 28. They also argue that "RSA 47:17, XIII cannot be read so broadly as to enable [the] ordinance" because if "the mere display of a nipple in a non-sexual manner was obscene or immoral," state law would not allow women to expose their nipples while breastfeeding, DB 28-29, and that it "is [also] inapplicable," DB 29. They further argue that RSA 47:17, XV "should not be interpreted as allowing *anything* ...." DB 29. They last argue that recent legislative history clearly demonstrates that the legislature does not want to prohibit females from exposing their nipples or to allow municipalities to do so. DB 28-29. Several of those claims are not preserved.

In the trial court, the defendants never argued that RSA 47:17 (2012) was overbroad or that females had a right to breastfeed in public. In fact they never used the word "overbroad" or mentioned RSA 132:10-d or a right to breastfeed. They also never argued that the "display of a nipple d[id] not meet the criteria of RSA 47:17, II" or that RSA 47:17, XIII did not apply. In addition, they never used the words "face" or "facial" or moved the trial court to reconsider after it held that RSA 47:17, XIII did apply, and that it gave the City the authority to regulate the clothing worn on the beach. Therefore, none of those claims are preserved because the trial court

never had the opportunity to consider them. *See Mouser*, 168 N.H. at 27. That being the case, this Court also should not consider them. *See Blackmer*, 149 N.H. at 49.

In any event, "[w]hen a municipal ordinance is challenged, there is a presumption that [it] is valid ...." *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491, 498 (2007). Thus, it "will not be declared void except on unescapable grounds." *Donnelly v. Manchester*, 111 N.H. 50, 51 (1971). Here, because the defendants appear to be making a facial challenge to the ordinance, they must establish that it is invalid, *Donnelly*, 111 N.H. at 51, and "that no set of circumstances exists under which [it] would be valid," *Hollenbeck*, 164 N.H. at 158. They have failed to do so.

In order to determine whether RSA 47:17 authorized the City to enact the ordinance, this Court must engage in statutory interpretation.

> The interpretation of a statute is a question of law, which [this Court will] review *de novo*. [It is] the final arbiter[] of the legislature's intent as expressed in the words of the statute considered as a whole. ... [This Court will] look first to the statute's language, and, if possible, construe that language according to its plain and ordinary meaning. [It does] not read words or phrases in isolation, but in the context of the entire statutory scheme. [This Court's] goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. [It] will not consider what the legislature might have said or add language that the legislature did not see fit to include.

State v. Balch, 167 N.H. 329, 332 (2015) (citations omitted). "Generally, [this Court will] apply the ordinary rules of grammar and common usage to assist [it] in interpreting a statute whose meaning depends heavily on sentence structure." *Id.* at 177-78. In addition, "[u]nless [it] finds statutory language to be ambiguous, [it] will not examine legislative history." *Prolerized New England Co. v. City of Manchester*, 166 N.H. 617, 622 (2014) (quotation omitted). Here, the plain language of the statute makes it clear that the City had the authority to prohibit females from displaying their nipples at public beaches, and that it also had the authority to prohibit them from doing so at all public places.

RSA 47:17 provides that cities "may make ... ordinances ... for the purposes stated in this section." RSA 47:17, XIII then provides, in relevant part, that they may do so "[t]o restrain ... all kinds of immoral and obscene conduct, and to regulate the times and places of bathing and swimming in the ... waters of the city, and to regulate the clothing to be worn by bathers and swimmers." The defendants argue that it "cannot be read so broadly as to enable [the] ordinance" because "a female nipple is not in itself immoral or obscene." DB 29. However, "[a]ccording to normal rules of English punctuation, the placement of commas between each element enumerated and before the conjunction, 'and,' generally dictates that the elements are to be read as a consecutive series of discrete items." *Marcotte v. Timberlane/Hampstead School District*, 143 N.H. 331, 338-39 (1999) (citations omitted).

Here, the "immoral and obscene" and "bathing and swimming" elements enumerated in RSA 47:17, XIII are separated by a comma and the word "and," so they "must be read as discrete items ...." *Id.* at 339. That being the case, even if the mere exposure of a female nipple is neither immoral nor obscene, the plain language of RSA 47:17, XIII gives cities the authority to require female bathers and swimmers to wear clothing that covers their nipples. Therefore, the ordinance is valid as applied to the defendants' conduct—exposing their nipples on the beach. That being the case, it is also valid on its face.

Furthermore, RSA 47:17, II provides, in relevant part, that cities may enact ordinances "to prevent any ... disturbance ...." The defendants argue that "[t]he mere display of a nipples does not meet the criteria," because "[i]f it did, Laconia would have prohibited *all* nipples from being displayed in public." DB 28. They also argue that it "cannot be interpreted in a way that is overbroad and invades constitutional rights of Equal protection and Free Speech/Expression." DB 28. However, they do not develop that argument or cite any authority in support of it.

Therefore, this Court should decline to consider it because it is insufficiently briefed to warrant its consideration. *See Durgin*, 165 N.H. at 731; *Blackmer*, 149 N.H. at 49.

In any event, as demonstrated in §§ I and II of this brief, the ordinance's ban on females displaying their nipples does not violate equal protection or the right to free speech. In addition, the evidence at trial clearly demonstrated that the ban on females displaying their nipples in all public places is reasonably related to that purpose. Pierro testified that males were also exposing their nipples on the beach and on the sidewalk. MH 11. However, no witness testified that males doing so created a "disturbance" or that anyone was offended by or complained about them doing so. In fact, Smith testified that males doing so did not offend her, but females doing so did, and that she called the police to complain that Sinclair and Lilley were doing so. MH 49-53. Pierro also testified that people confronted and harassed her about having her nipples exposed, MH 15-18, and the officers testified that numerous people were offended by and complained about her doing so, MH 28, 35-36, 38-39, 41, 60. Therefore, it is clear that RSA 47:17, II, gave the City the authority to enact an ordinance for the purpose of preventing disturbances, and that its ban on females exposing their nipples in all public places was reasonably related to that purpose.

Moreover, RSA 47:17, XV, provides, in relevant part, that cities "may make any other bylaws and regulations which may seem for the well-being of the city; but no bylaw or ordinance shall be repugnant to the constitution or laws of the state ...." The defendants argue that it "should not be interpreted as allowing *anything*, otherwise the rest of Chapter RSA 47:17 would be unnecessary" and "turn New Hampshire into a 'home rule' state as far as it applies to [c]ities." DB 29. However, they have failed to develop that claim. Therefore, this Court should decline to

address it because it is insufficiently briefed to warrant this Court's consideration. *See Durgin*, 165 N.H. at 731; *Blackmer*, 149 N.H. at 49.

In any event, legislative bodies are "presumed not to use superfluous language, so "an interpretation that renders ... language [in a law] superfluous and irrelevant is not a proper interpretation." *State v. Duran*, 158 N.H. 146, 155 (2008) (discussing statutory language). Here, the language at issue cannot be interpreted as authorizing nothing because doing so would render it "superfluous and irrelevant." Instead, it must be interpreted as authorizing cities to prohibit any additional conduct they deem may pose a risk to "the well-being of the city" unless doing so is "repugnant to the constitution or laws of the state." Here, as demonstrated above, prohibiting females from exposing their nipples may pose a risk to "the well-being of the [C]ity," and as demonstrated in §§ I and II of this brief, prohibiting that conduct is not repugnant to the constitution or RSA 132:10-d. In addition, as will be demonstrated in § IV of this brief, prohibiting that conduct is not repugnant to RSA 645:1 or to RSA chapter 354-A.

The defendants last argue that "it is very clear the legislature does not want to either prohibit women from appearing topless in public or provid[e] authority to towns or cities to [do so]" because after the trial court found the "Gilford ordinance unenforceable due to lack of authority," legislators introduced 2016 HB 1525-FN, which "would have added female breasts to the public indecency statute," and 2016 SB 347, which would have given municipalities explicit authority "to regulate sunbathing while prohibiting breastfeeding," but "[t]he House resoundingly defeated and criticized both bills." DB 29-30. However, they have neither argued nor demonstrated that the language of RSA 47:17 or any state statute is "ambiguous," so this Court "will not examine legislative history." *Prolerized New England Co.*, 166 N.H. at 622.

In any event, contrary to their claim, the House did not "resoundingly defeat" either bill. DB 29. In fact, neither the full House nor the Senate considered them because House committees of less than 20 members voted them "[i]nexpedient to [l]egislate." ASB 24, 29, 32-33. Therefore, their actions and opinions are not evidence of the entire legislature's intent.

Furthermore, the House committee's representative stated that cities already had the authority to "regulat[e] attire" on their "property," and that it "might have considered removing th[at] provision," but it "would be retrospective legislation and would not have been upheld in court when existing ordinances were determined illegal." ASB 39. In addition, before 2016 SB 347 reached the House committee, a Senate committee stated that it "[o]ught to [p]ass" as amended. ASB 33. Therefore, what is clear from recent legislative history is that the House committee concluded that RSA 47:17 already gave cities authority to regulate attire on their property, and that the Senate committee concluded the legislature would amend RSA 47:17, XIII to make it clear they had that authority. That being the case, the trial court did not err in finding that the City had the authority to prohibit females from exposing their nipples on the beach.

IV. The trial court properly found that the ordinance is not preempted by or contrary to RSA 645:1 and does not violate RSA chapter 354-A because it does not expressly contradict them or run counter to the legislative intent underlying the statutory schemes.

In rejecting the defendants' claim that the charges against them had to be dismissed because the ordinance is contrary to and preempted by RSA 645:1, the "Indecent Exposure and Lewdness" statute, the trial court noted that this Court has held that "the failure to enact 'is not legislative action in this area ....'" ADB 28 (quoting *Dover News, Inc.*, 117 N.H. at 1069). It then held that "the subject ordinance is neither invalidated [by] nor repugnant [to the] legislative regulatory preemption in RSA 645:1." ADB 31. In rejecting the defendants' claim that the charges had to be dismissed because the ordinance violates RSA 354-A:16, the trial court held

that it does not do so because it "does not limit the use of the public accommodation by discriminating against individual[s] by gender thereby restricting access of the public property," but instead "prohibits conduct at that public accommodation." ADB 29.

On appeal, the defendants argue that the trial court erred in doing so: (1) because "[t]he ordinance is pre-empted under ... RSA 645:1," DB 30, and "subsequent legislative attempts to broaden [it] or to allow the towns and cities authority to regulate female toples[s]ness have been defeated," DB 31; (2) because it is "also preempted under ... RSA [chapter] 354-A," DB 31; (3) because RSA 47:17 does not "authorize the city to prohibit the conduct for women and not men," DB 31; (4) because doing so "is repugnant to the State Constitution," DB 31; and (5) because doing so is "specifically prohibited under RSA [chapter] 354-A," DB 31. However, they have not developed any of those claims in this section of their brief, and although they have developed the third and fourth claims elsewhere in their brief, their reliance on the arguments in § V of their brief in support of the second claim is misplaced because it addresses whether the ordinance violates RSA chapter 354-A, not whether it is preempted by it. *See* DB 31-33. In fact, the defendants have not cited to, set forth, or analyzed their claims under the preemption standards of review or indicated whether they are claiming express or implied preemption. Therefore, this Court should not address the first, second, or third claims because they are insufficiently briefed to warrant its consideration. *See Durgin*, 165 N.H. at 731; *Blackmer*, 149 N.H. at 49.

In any event, even if this Court considers all of the claims, as demonstrated in §§ I and II of this brief, the ordinance is not repugnant to the state constitution, and, as demonstrated in § III of this brief, the ordinance is not repugnant to, nor does it violate, RSA 47:17. Therefore, the only questions remaining are whether the trial court erred in finding that the ordinance is not preempted by RSA 645:1, and that it does not violate RSA chapter 354-A. It did not do so.

> It is well settled that towns cannot regulate a field that has been preempted by the State. The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law. Municipal legislation is preempted if it expressly contradicts State law or if it runs counter to the legislative intent underlying a statutory scheme. [This Court will] infer an intent to preempt a field when the legislature enacts a comprehensive, detailed regulatory scheme.

Thayer v. Town of Tilton, 151 N.H. 483, 487 (2004) (quotation and citations omitted). However, "[a]bsent a clear manifestation of legislative intent to preempt a field, a municipality may enact an ordinance that neither conflicts with State legislation nor is itself unreasonable." *Id.* at 488. "An issue of state preemption is essentially one of statutory interpretation." *Town of Rye Bd. of Selectmen v. Town of Rye Zoning Bd. of Adjustment*, 155 N.H. 622, 624 (2007). This Court will "review the trial court's statutory interpretation *de novo.*" *Id.* Here, a review of the plain language of the statutes demonstrates that the ordinance does not expressly contradict them or run counter to the legislative intent underlying either statutory scheme.

RSA 645:1, I provides: "A person is guilty of a misdemeanor if such person fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm." The plain language of the statute does not make it legal or illegal for a female to expose her nipples in public. Therefore, the ordinance does not expressly contradict the statute.

Furthermore, as demonstrated in § III of this brief, the full legislature never had an opportunity to consider the 2016 bills because small House committees voted them inexpedient to legislate. It is also worth noting that 2016 HB 1545-FN would have expanded RSA 645:1, I, to include the exposure of the male or female anus and the exposure of the female nipple and areola, ASB 28, and that the same year the committee voted it inexpedient to legislate, the entire legislature passed another bill that made it a crime to obtain or disseminate, without consent, images of "intimate parts," RSA 644:9-a, I, II, and defined "intimate parts" as "the fully

unclothed, partially unclothed, or transparently clothed genitals, pubic area, or *anus, or, if the person is female, a partially or fully exposed nipple, including exposure through transparent clothing*," RSA 644:9-a, I(c) (emphasis added). *See* Laws 2016, 126:1. Therefore, it cannot be said that there is "a clear manifestation of legislative intent to preempt [the] field," *Thayer,* 151 N.H. at 487, or that the ordinance "runs counter to the legislative intent underlying [the] statutory scheme," *id.* at 488. That being the case, the ordinance is valid as long as it "neither conflicts with State legislation nor is itself unreasonable." *Id.*

As demonstrated above, the ordinance does not conflict with RSA 645:1, and as demonstrated in § III of this brief, it does not conflict with, nor is it an unreasonable application of, the City's power to prevent disturbances under RSA 47:17, II. Therefore, the ordinance is valid as long as it does not conflict with RSA chapter 354-A. DB 31-32. It does not do so.

"RSA chapter 354-A ... prohibits unlawful discrimination based upon ... sex ... in ... public accommodations as provided therein." *EEOC v. Fred Fuller Oil Co.*, 168 N.H. 606, 609 (2016) (citing RSA 354-A:16-:17 (2009)). In determining whether the ordinance violates that chapter, this Court will be "mindful of the legislative directive to liberally construe the statutory scheme in RSA chapter 354-A to effectuate its purpose." *Id.* (citing RSA 354-A:25 (2009)). Here, even liberally construing the statutory scheme, it is clear from the plain language of the relevant statutes in the chapter that the trial court did not err in finding that the ordinance does not violate them.

RSA 354-A:16 (2009) provides, in relevant part, that "[t]he opportunity for every individual to have equal access to places of public accommodation without discrimination because of ... sex ... is hereby recognized and declared to be a civil right." The defendants argue that "[u]nder RSA [chapter] 354-A, a ... city cannot exclude someone from being on public

property based solely on that person's sex/gender," which "is precisely what the ordinance accomplishes." DB 32. However, the ordinance does not prohibit them from being on public property. Instead, it prohibits them only from being on that property topless.

Furthermore, RSA 354-A:17 (2009) provides, in relevant part, that

> [i]t shall be an unlawful discriminatory practice for any *person*, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, because of the ... sex ... of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof ...."

(Emphasis added.) "The purpose of the law is to ensure that publicly offered goods and services ... are available to individuals regardless of gender or other protected characteristics." *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 585 (2003). "To be subject to the statute's proscriptions, an organization or establishment must be a 'place of public accommodation.'" *Id.* RSA 354-A:2, XIV (2009) then provides, in relevant part, that a "'[p]lace of public accommodation' includes any inn, tavern or hotel, ... any restaurant, eating house, public conveyance on land or water, bathhouse, barbershop, theater, golf course, sports arena, health care provider, and music or other public hall, store or other establishment which caters or offers its services or facilities or goods to the general public."

Here, the ordinance was adopted by the City, not a person, the defendants were on a public beach, which is not a "place of public accommodation," and, as demonstrated in § I of this brief, being nude or topless in puic is not a constitutional right or a privilege. Therefore, the ordinance is not preempted by, nor does it violate, RSA chapter 354-A. Accordingly, for all the reasons stated in this brief, this Court must affirm the defendants' convictions.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a 15-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,
Gordon J. MacDonald
Attorney General

October 10, 2017

Susan P. McGinnis, Bar No. 13806
Senior Assistant Attorney General
Criminal Justice Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3671
susan.mcginnis@doj.nh.gov

CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Daniel Hynes, counsel of record for the defendants, and Gilles R. Bissonnette, counsel of record for the amicus, at the following addresses:

Daniel Hynes
Liberty Legal Services
212 Coolidge Ave.
Manchester, NH 03102

Gilles R. Bissonnette
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301

October 10, 2017

Susan P. McGinnis